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In the

Supreme Court of the United States

October Term, 1998

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

JOHN E. WARD,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WYOMING AND THE TERRITORY OF PUERTO RICO AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

The 42 amici curiae states, through their attorneys general, respectfully submit this brief in support of Respondent Ward. The states have a vital interest in ensuring that the scope of preemption by the Employee Retirement Income Security Act of 1974 (ERISA) is not extended beyond Congress's intent. Prior to this Court's ruling in *New York State Conference of Blue Cross & Blue Shield v. Travelers Insurance Co.*, 514 U.S. 645, 654 (1995), circuit courts took such an expansive view that "we could scarcely see the end of ERISA's preemptive reach." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 331-32 (1997). As a result, this Court ruled in *Travelers* that absent the express intent of Congress to preempt, traditional state powers can and should coexist with federal regulation. Now, in response to Petitioner UNUM's claim of a right to conduct its insurance business without regard for state law, this Court is needed once again to ensure that Congress's intent is fulfilled.

SUMMARY OF ARGUMENT

Congress enacted ERISA in 1974 for one paramount purpose: to protect employees' interests in pension and welfare plans from employer abuse and mismanagement. It is therefore ironic that insurers like UNUM now seek to use ERISA not as a shield to protect employees, but as a sword to eviscerate the protections of state law. States have long protected their citizens through their insurance laws – laws which Congress deferred to by expressly providing that "any" state law "which regulates insurance" is saved from ERISA preemption. Yet even as UNUM seeks to profit by selling and administering state-licensed insurance products for ERISA plans, it invokes ERISA to defeat virtually all state regulation of these products.

1. California's notice-prejudice rule provides that an insurer may not deny benefits on the ground that the insured's claim was untimely filed unless the insurer can demonstrate that it was prejudiced by the untimeliness. Our ERISA analysis of this rule starts with the broad language of the saving clause, which preserves "any" state law "which regulates insurance." This Court has consistently held that whether a state law "regulates insurance" is a matter of common sense. The road map for this approach is set forth in *Securities & Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969), which states that "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these [are] the 'core of the business of insurance.'" The notice-prejudice rule goes to the heart of the insurance relationship – it determines whether a disabled beneficiary under an insured group plan gets any of the benefits for which the policy was purchased and its premiums paid. Thus, as a matter of common sense, it "regulates insurance."

UNUM, however, argues that a state law does not regulate insurance unless it satisfies all three factors (the "*Pireno* factors") developed to determine whether a practice is exempt from federal antitrust laws under the McCarran-Ferguson Act. This is contrary to this Court's decisions, which use the *Pireno* factors to augment – not undermine – the common sense approach. It is also inconsistent with the bases of the statutes, as the ERISA saving clause and the McCarran-Ferguson antitrust exemption serve entirely different purposes. Moreover, UNUM's argument would be directly contrary to Congress's intent to preserve essential state laws that regulate insurance relationships, policies and the interpretation and enforcement of insurance contracts.

UNUM compounds its misuse of the *Pireno* factors by interpreting each of them so restrictively that few if any state insurance laws could survive them. UNUM contends that no state law regulating claims determination and the payment of benefits spreads or transfers risk (the first *Pireno* factor). UNUM could not be more wrong: laws governing whether claims are honored and benefits are paid embody the extent and allocation of the risk transferred. UNUM contends that a state law regulating the administration of an insurance policy somehow does not affect the insurance policy relationship (the second *Pireno* factor), yet the saving clause makes no distinction between laws regulating administration and those regulating benefits. And UNUM contends that any insurance law having its genesis in the common law is not a law aimed at the insurance industry (the third *Pireno* factor) – as if to suggest that state legislators and courts should regulate insurance by first jettisoning any notion that such laws might have roots or analogues in the common law. In short, a reasonable application of the *Pireno* factors – unlike UNUM's – could only support a holding that the notice-prejudice rule regulates insurance.

Finally, UNUM argues that when an insurer administers an insurance policy for an ERISA plan, all state regulation of these activities is barred by the deemer clause. The deemer clause, however, merely bars states from certain regulation of self-insured plans. Indeed, UNUM ignores the fundamental distinction the deemer clause creates between self-insured plans and insured plans like the one at issue here.

2. Contrary to UNUM's argument, neither the notice-prejudice rule nor the *Elfstrom* rule conflicts with any substantive provision of ERISA. Ward's suit against UNUM states an ERISA cause of action for payment of benefits due under the UNUM disability insurance policy that funds his

employer's plan – a policy issued pursuant to California insurance law, including the notice-prejudice and *Elfstrom* rules. Thus, *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), which involved a state law cause of action seeking damages for wrongful denial of benefits, is readily distinguishable.

UNUM's second argument asserting substantive conflict with ERISA is probably its most extreme: that California's insurance laws conflict with ERISA's requirement that fiduciaries administer plans "in accordance with" their written terms and pay benefits only if they are "due" under those terms. Thus, according to UNUM, ERISA gives insurance companies a license to violate state insurance law at will, simply by inserting contrary language in policies sold to ERISA plans. Surely Congress did not intend ERISA to empower insurers to write their own laws. Finally, the notice-prejudice and *Elfstrom* rules do not conflict with ERISA provisions regarding plan compliance with claims regulations promulgated by the Secretary of Labor.

3. The Ninth Circuit correctly held that the *Elfstrom* rule does not "relate to" ERISA plans and thus is not preempted. *Elfstrom* applies ordinary state common law agency principles in the insurance context, including the relationship between insurers and any third parties involved in policy administration. Because it is indifferent to the identity of those third parties, *Elfstrom* does not refer to or depend on the existence of ERISA plans. *Elfstrom* does not dictate or restrict any administrative or benefit choice that ERISA plans may make – it neither compels nor prohibits their choices concerning involvement in insurance policy administration. *Elfstrom* does not even indirectly dictate ERISA plan choices, since it does not restrict insurers' options in this regard either.

Elfstrom does result in the imposition of legal consequences upon insurance companies like UNUM who choose to involve others as their agents in policy administration, in that such insurers may have to pay claims they would otherwise have denied. This consequence, however, is not imposed on the ERISA plan, but on the insurer as an entity which, by contractually assuming the plan's risk of loss, is engaged in the business of insurance. Whatever indirect economic impact this may have on ERISA plans is insufficient to "relate to" them for preemption purposes.

ARGUMENT

I. THE NOTICE-PREJUDICE RULE "REGULATES INSURANCE" AND IS THEREFORE SAVED FROM EXPRESS PREEMPTION UNDER ERISA'S SAVING CLAUSE

The Ninth Circuit correctly held that California's notice-prejudice rule is saved from preemption by ERISA's saving clause because it regulates insurance. UNUM levies three basic arguments against the circuit court's conclusion. First, UNUM asserts that a state law does not regulate insurance unless it satisfies all three factors developed to determine whether a practice is exempt from federal antitrust laws under the McCarran-Ferguson Act (the "*Pireno* factors").[1] Pet. Br. 22. Second, UNUM constructs exceedingly high hurdles that state laws must meet to satisfy each of the three *Pireno* factors. Few state insurance laws could clear them, and none that pertain to

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[1] These factors were described in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 128 (1982), and are commonly referred to as the *Pireno* factors.

the determination and payment of insurance claims. *Id.* at 23-29. Third, UNUM asserts that even if the notice-prejudice rule "regulates insurance," it is not saved from preemption because the "deemer clause" bars state regulation of the administration of ERISA plans even when undertaken by outside insurance companies. *Id.* at 36-38.

Adopting any of UNUM's positions would conflict with Congress's express intent by dramatically reducing the scope of ERISA's saving clause, and removing vast portions of the insurance industry from traditional state regulation. Applying the proper analysis, the ERISA saving clause plainly applies to the notice-prejudice rule.

A. The ERISA Saving Clause Saves from Preemption State Laws That, as a Matter of "Common Sense," Regulate Insurance Such as Laws That Regulate Insurance Relationships, Types of Insurance Policies, and the Interpretation and Enforcement of Insurance Contracts

1. A "common sense" reading of the ERISA saving clause is consistent with congressional intent and has been adopted by this Court

Congress expressly saved state insurance laws in ERISA. Although Congress preempted state laws that "relate to" employee benefit plans (ERISA plans), Congress provided in ERISA's saving clause that "[e]xcept as provided in [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which *regulates insurance*, banking, or securities." 29 U.S.C. §1144(b)(2)(A) (emphasis added). Through this provision, Congress expressed its intent that states continue to exercise their traditional powers in the field of insurance. Regardless of

whether a state statute "relates to" an ERISA plan, the "ERISA plan is . . . bound by state insurance regulations insofar as they apply to the plan's insurer." *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990).

This Court has recently reaffirmed the starting presumption that Congress did not intend to supplant state law, especially in areas traditionally left to state regulation. *Travelers*, 514 U.S. at 654; *Dillingham*, 519 U.S. at 331-32; *De Buono v. NYSA-ILA Medical & Clinical Serv. Fund*, 520 U.S. 806, 814 (1997). Where, as here, Congress expresses its intent to save from preemption state laws that regulate insurance, there is no basis to impose a restrictive interpretation of the clause. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 745 (1985). A narrow, artificial reading of the term "regulates insurance" would be inconsistent with that intent, and finds no support in the language of the saving clause or ERISA generally.

This Court has effectuated Congress's intent by consistently holding that whether a state law "regulates insurance" under ERISA is a matter of "common-sense." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987); *Metropolitan Life*, 471 U.S. at 740. The amici states submit that this Court's opinion in *Securities & Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969), which the Court quoted in *Metropolitan Life*, 471 U.S. at 743-44, provides the road map as to what types of laws regulate insurance as a matter of common sense: "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the 'core of the business of insurance.'" Laws regulating an insurance relationship, types of insurance policies and the interpretation and enforcement of insurance contracts address the "core of the business of insurance," and are, therefore, laws that "regulate insurance" under the ERISA saving clause.

Accordingly, in *Metropolitan Life*, this Court held that a state law mandating that insurance companies provide certain coverages "regulates insurance" as a matter of common sense and was thus saved from preemption. 471 U.S. at 740. The Court reasoned that the mandated-benefit law regulated the terms of insurance contracts and that Congress expressly reserved the regulation of insurance contracts to the state. The Court observed that, "[b]y exempting from the saving clause laws regulating insurance contracts that apply directly to benefit plans, the deemer clause makes explicit Congress' intention to include laws that regulate insurance contracts within the scope of the insurance laws preserved by the saving clause." *Id.* at 741. That general reading of the ERISA saving clause – that it saves laws that "regulate insurance contracts" – encompasses those types of insurance regulation that address "the core of the business of insurance" as described in *National Securities*. There is no basis in the words of ERISA, or any legal or policy reason, that a state regulation of an underlying insurance transaction must meet any additional test.

2. This Court has never required that the three *Pireno* factors be met for a law to "regulate insurance," and has used them only as a secondary analysis

a. Only after first concluding that the mandated-benefit law was a law regulating insurance saved from preemption did the Court in *Metropolitan Life* consider cases analyzing the antitrust exemption clause in the McCarran-Ferguson Act. The insurance company in *Metropolitan Life* sought to evade application of a state insurance law by claiming that the mandated-benefit law was not traditional insurance. After holding that the saving clause is not limited to traditional insurance laws, but includes innovative laws, the Court

nevertheless went on to use analysis applicable to the antitrust clause of the McCarran-Ferguson Act to find the mandated-benefit law to be traditional insurance regulation. 471 U.S. at 742-43. Specifically, the Court supported its conclusion by applying the three factors outlined in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 128 (1982), a case involving whether a health insurer's use of a peer review committee was exempt from federal antitrust laws.[2]

This Court, however, has *never* held that a state law is saved from ERISA preemption only if it meets *both* the common-sense definition of regulating insurance *and* all or some of the three *Pireno* criteria. Indeed, in *Pireno* itself, this Court noted that all three criteria need not be met for "the business of insurance" to be exempt from the federal antitrust laws, expressly stating that "none of these criteria is necessarily dispositive in itself." 458 U.S. at 128. Moreover, after the decisions in *Metropolitan Life* and *Pilot Life*, the Court held that the Pennsylvania antisubrogation law, a law regulating an insurance contract, was saved from preemption without ever considering the *Pireno* factors. *FMC Corp.*, 498 U.S. at 60-61. UNUM, and the several lower court decisions upon which it relies, are therefore mistaken in contending that this Court has required that all three *Pireno* factors be met before a state insurance regulation may be saved from preemption.

b. More fundamentally, the ERISA saving clause and the antitrust exemption of the McCarran-Ferguson Act are worded differently and serve different purposes. Narrowing the scope of the ERISA saving clause to conform to limits on the application of the McCarran-Ferguson antitrust exemption

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[2] Those factors are whether the law spreads risk, is an integral part of the policy relationship, and is limited to entities within the insurance industry. *Pireno*, 458 U.S. at 129.

mistakenly equates the two provisions. *Pireno* addressed the second clause of 15 U.S.C. §1012(b), which exempts from the antitrust laws "the business of insurance." The goal of that provision of the McCarran-Ferguson Act was not to grant the states broad regulatory authority over the field of insurance; it was to protect the insurance business itself by "carv[ing] out only a narrow exemption . . . from the federal antitrust laws." *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 505 (1993). By contrast, the ERISA saving clause preserves state authority to regulate the insurance industry free of preemption. There is no logical or policy reason why determining whether a state statute "regulates insurance," and thus is not preempted by ERISA, should be resolved by applying criteria used to determine whether a business practice is in the "business of insurance" such that it is not subject to the federal antitrust laws.

To the extent analysis of the McCarran-Ferguson Act is appropriate, the first clause of §1012(b), not the second, is the relevant provision. The first clause of §1012(b) reserves to the states the power to regulate insurance and provides that federal law shall not "supersede any law enacted by any state for the purpose of regulating the business of insurance." This provision's purpose – like the purpose of the ERISA saving clause – is to *preserve* state power. It follows that this Court's interpretation of the first clause of the McCarran-Ferguson Act – undertaken in *National Securities*, *supra* – is more useful in analyzing the ERISA saving clause.

In *Fabe*, the Court held that the analysis in *Pireno* (which addressed the second clause of §1012(b)) does not resolve whether a state statute "regulat[es] the business of insurance" and thus may not be superseded by federal law under the first clause. 508 U.S. at 504-505. Just as the three *Pireno* criteria do not control the first clause of the McCarran-Ferguson Act,

those three criteria should not control the ERISA saving clause. The proper view is that the *Pireno* factors "are simply relevant considerations or guideposts, not essential elements of a three-part test that must each be satisfied for a law to escape preemption." *Washington Physicians Serv. Ass'n v. Gregoire*, 147 F.3d 1039, 1047 (9th Cir. 1998).

c. A rule requiring that all three *Pireno* factors be met before a state statute is found to "regulate insurance" could – contrary to *Metropolitan Life* and *National Securities* – prevent the ERISA saving clause from saving myriad state laws that regulate insurance relationships, types of insurance policies and the interpretation and enforcement of insurance contracts. A number of lower courts, however, have rigidly applied the *Pireno* factors to erroneously find that state insurance laws that regulate insurance relationships and contracts do not regulate insurance for purposes of the ERISA saving clause. Examples of state laws mistakenly found not to regulate insurance are laws that address the reliability of policies by prohibiting insurance company misrepresentations,[3] the fundamental rule of insurance contract construction that an ambiguous policy is construed against the insurer,[4] laws regarding when insurance policies may be enforced (*e.g.*, when an insurance company

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[3] *See DeBruyne v. Equitable Life Assurance Soc.*, 920 F.2d 457, 468-70 (7th Cir. 1990) (reasoning that laws prohibiting misrepresentations do not spread risk).

[4] *See Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 153 (8th Cir. 1990) (citing *McMahan v. New England Mut. Life Ins. Co.*, 888 F. 2d 426, 429 (6th Cir. 1989)) (the rule "does not effect a spreading or transferring of policyholders' insurance risk, but rather forces the insurer to bear the legal risks associated with ambiguous policy language"), *cert. denied*, 501 U.S. 1238 (1991).

may rescind a policy),[5] and laws regulating Health Maintenance Organizations (HMOs).[6] Most lawyers, legislators and lay persons would consider each of those laws to be laws regulating insurance. Each squarely regulates an insurance relationship, and addresses the "core of the business of insurance" as described in *National Securities*.

B. UNUM's analysis of the individual *Pireno* factors erroneously narrows them to such a degree that few insurance laws would satisfy any of them

Although the *Pireno* factors are not dispositive of whether a state insurance law is saved from preemption under the ERISA saving clause, those factors are used to support what common sense reveals. *Metropolitan Life*, 471 U.S. at 742-43. Moreover, misapplication of the *Pireno* factors has led to many of the erroneous decisions by the lower courts. For these reasons, it is necessary to respond to UNUM's proposed interpretation of the three factors, none of which is correct.

1. Spreading of risk. UNUM relies upon this Court's statement in *Pireno*, 458 U.S. at 130, that the "transfer of risk from insurer to insured is effected by means of the contract between the parties . . ., and . . . is complete at the time that the contract is entered." Pet. Br. 24. Taken to its literal extreme, as UNUM and some lower courts have, that statement means

[5] *See Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 941 (6th Cir. 1997) (holding they do not shift policyholder risk, but merely spread the risk of innocent misrepresentation); *Tingle v. Pacific Mutual Ins. Co.*, 996 F.2d 105, 108 (5th Cir. 1993) (same).

[6] *See, e.g., O'Reilly v. Ceuleers*, 912 F.2d 1383, 1389 (11th Cir. 1990) (holding that HMOs do not spread risk); *but see Cellilli v. Cellilli*, 939 F. Supp. 72, 77 (D. Mass. 1996) (holding that HMOs spread risk).

that no state insurance law regulating the performance of an insurance contract affects the spreading of risk. But such laws obviously do affect the transfer of risk; indeed, the performance of an insurance contract is the embodiment of the kind and amount of risk being transferred. For this reason, this Court in *Fabe* clarified that the statement in *Pireno* "presumes that the insurance contract in fact will be enforced." 508 U.S. at 504. If the contract is not performed, "there is no risk transfer at all" – which most definitely affects the transfer of risk (to the insured's detriment). *Id.* Indeed, UNUM would not be fighting so hard to be exempted from the notice-prejudice rule if that rule did not affect a transfer of risk. The notice-prejudice rule, like other state laws affecting claims determination and payments, has a direct impact on whether beneficiaries will be paid and thus an immediate effect on whether any risk has been spread.

2. Integral part of the policy relationship. UNUM appears to be arguing that a state law regulating the *administration* of an insurance policy does not affect the insurance *policy* relationship. Pet. Br. 28. This is part of UNUM's broad-ranging effort to limit the ERISA saving clause exclusively to state laws regulating substantive policy benefits. We address this mistaken notion is Part (I)(D), *infra*. Suffice it to say, the saving clause makes no distinction between state insurance laws regulating administration and those regulating benefits, and no decision by this Court has crafted such a dichotomy.

3. Limited to the insurance industry. UNUM's argument as to this factor poses possibly the greatest threat to Congress's intent in enacting the saving clause. According to UNUM, any insurance law that has its genesis in general common law is not a law aimed specifically at the insurance industry and therefore cannot meet the common-sense definition of insurance. Pet. Br. 22-23. Not only does that position mistakenly conflate the

common-sense inquiry with the third *Pireno* factor, it would have the ERISA saving clause save little besides laws dictating policy benefits.

A great many insurance laws have some roots or analogues in the common law, as one would expect. Although insurance contracts pose special concerns that lead to special rules, those rules were rarely created out of whole cloth. Rather, courts and legislators commonly look to existing rules and principles and determine how they should be modified to address the insurance setting. To contend, as UNUM does, that *Pilot Life* compels its position is to contend that *Pilot Life* effectively overturned *Metropolitan Life* because many insurance laws embody principles that may also be found elsewhere in the common law. *Pilot Life*, however, expressly stated that it was not overturning *Metropolitan Life*. 481 U.S. at 57.

C. Applying the Analysis Set Forth in *Metropolitan Life*, the Notice-Prejudice Rule is a Law that "Regulates Insurance" for Purposes of the ERISA Saving Clause

As a matter of common sense, the notice-prejudice rule regulates insurance. The rule governs when insurance policyholders who have filed late notices or submissions of proof have lost their claims. It affects the ultimate issue in any insurance contract – whether the policyholder's claim is paid. If the notice-prejudice rule does not regulate insurance, what does it regulate? Though it might be considered a consumer protection statute – protecting consumers from losing their rights for, as a practical matter, no good reason – the field in which it is operating is the insurance business. Turning to the *National Securities* description, the notice-prejudice rule is both a rule affecting the insurance relationship between Ward and UNUM, as well as a rule affecting the enforcement of an

insurance contract. It is, therefore, plainly a rule addressing the "core of the business of insurance" and, as such, regulates insurance as a matter of common sense.

The *Pireno* factors support that conclusion, for many of the reasons discussed in Part (I)(B), *supra*. The notice-prejudice rule spreads risk because it determines whether the insurance contract will be enforced at all. If the contract is not performed, the insured has not transferred his risk and must, accordingly, bear the full financial brunt of the insured event. As to the second *Pireno* factor, the "performance of an insurance contract . . . is central to the policy relationship between insurer and insured." *Fabe*, 508 U.S. at 503. Unquestionably, the notice-prejudice rule regulates the performance of the insurance contract. Finally, the notice-prejudice rule is confined to entities within the insurance industry. UNUM cites no cases applying the notice-prejudice rule outside the insurance context. That one or two Restatement provisions embody principles similar to the notice-prejudice rule does not change that fact.

Thus, although amici agree with the Ninth Circuit that (1) the notice-prejudice rule regulates insurance as a matter of common sense, (2) the notice-prejudice rule satisfies the second and third *Pireno* factors, and (3) that is enough to establish that the ERISA saving clause applies to the rule, we disagree with one aspect of the Ninth Circuit's holding. The amici states submit that, to the extent the *Pireno* factors are relevant, the notice-prejudice rule also satisfies the first *Pireno* factor.[7]

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[7] If the Court agrees that all three *Pireno* factors are met, it does not have to determine whether they always must be examined and, if so, whether they all *must* be met. We believe, however, that the better course is to answer that question. That is the issue on which certiorari was granted, the lower courts need guidance, and it is an independent ground for affirming the judgment below.

D. Application of the Saving Clause to the Notice-Prejudice Rule Does Not Conflict with the Deemer Clause

UNUM argues that when an insurance company administers an insurance policy for an ERISA plan all state regulation of administration of the policy is direct regulation of the plan barred by the deemer clause. Pet. Br. 37.[8] This argument glosses over the distinction Congress has drawn, for preemption purposes, between insured and self-insured plans. It expands the deemer clause beyond its role of protecting self-insured plans and, correspondingly, eviscerates the insurance saving clause by removing from it a whole body of traditional state insurance law that regulates the insurer's administration of insurance policies. An insurance company is still an insurer for purposes of the saving clause even when it administers an insurance policy sold to an ERISA plan.

UNUM's argument is that if an activity is covered by ERISA, it is not insurance for purposes of the saving clause. An insurer's action granting or denying claims, however, is the core of the business of insurance for it is the mechanism by which the risk transfer is effectuated. Thus, in order to have any meaning at all, insurance laws must include laws that control ERISA covered activities. An ERISA plan's choice to purchase insurance renders the plan subject to state insurance

[8] The deemer clause provides that "neither an employee benefit plan . . . nor any such trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of the law of any State purporting to regulate insurance companies [or] insurance contracts." 29 U.S.C. §1144(b)(2)(B).

laws through the regulation of the insurance company. That is the whole point of the saving clause.[9]

UNUM justifies its extraordinarily broad reading of the deemer clause by reference to congressional concern for plan uniformity. Congress never intended uniformity to be more than a means to an end – to provide protection to employees. Moreover, that concern was addressed by Congress in the enactment of the preemption provision, 29 U.S.C. §1144. By including in that preemption provision a clause saving state laws that regulate insurance, Congress explicitly tempered its concern for plan uniformity to the extent plans choose to become insured. As the Court has previously recognized, "disuniformities . . . are the inevitable result of the congressional decision to 'save' local insurance regulation." *Metropolitan Life*, 471 U.S. at 747.

UNUM draws a distinction between laws regulating insurance benefits (which supposedly can be saved) and laws regulating insurance administration (which supposedly cannot be saved). Nothing in the language or legislative history of ERISA, however, indicates that in structuring the complex express preemption provisions of ERISA, Congress was more

[9] Moreover, the notice-prejudice rule does not even regulate UNUM in its capacity as an ERISA fiduciary. The notice-prejudice rule regulates plan administration by prohibiting insurance companies from inserting into insurance policies a provision that allow claims to be denied as untimely without a showing of prejudice to the insurer. An insurer is not acting as an ERISA plan, or as a plan fiduciary, when it designs the terms of the insurance contracts it sells. When UNUM administers a policy it sells to an ERISA plan, it has a fiduciary duty to administer the policy in accord with its written terms. However, those terms include, as a matter of law, all terms that are mandated or amended by state insurance law. The notice-prejudice rule implicates UNUM's fiduciary duty in this case only because UNUM inserted into the policy a term that is inconsistent with California's insurance law.

concerned with uniform plan administration than uniform benefit structure. Congress's failure to make any distinction between the two in either the saving clause or the deemer clause defeats UNUM's argument. This Court's decisions interpreting the scope of the saving clause and the deemer clause further refute the benefit-administration distinction that UNUM tries to draw.

In *Metropolitan Life*, this Court noted that the language of the deemer clause "makes explicit Congress' intention to include laws that regulate insurance contracts within the scope of the insurance laws preserved by the savings clause." 471 U.S. at 741. No distinction was made between laws that regulate the administrative terms of insurance contracts and laws that regulate benefits to be included in those contracts. While *Metropolitan Life* involved a state mandated-benefit law, *FMC Corp.*, 498 U.S. 52, involved Pennsylvania's anti-subrogation law, a state law affecting plan administration. Citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), this Court held that the law related to plans because it interfered with a uniform administrative scheme. *FMC Corp.*, 498 U.S. at 60. However, the law fell within the insurance saving clause because it "directly controls the terms of insurance contracts by invalidating any subrogation provisions they contain." *Id.* at 60-61. The Court then concluded that the deemer clause exempts self-funded, but not insured, plans from state laws regulating insurance. "An insurance company that insures a plan remains an insurer for purposes of state laws 'purporting to regulate insurance' after application of the deemer clause. The insurance company is therefore not relieved from state insurance regulation. The ERISA plan is consequently bound by state insurance regulations insofar as they apply to the plan's insurer." *Id.* at 61. Thus, so long as a state law regulates an insurer, it is excluded from the scope of the deemer clause.

Because the notice-prejudice rule applies to UNUM, the plan's insurer, it falls within the scope of the saving clause, unaffected by the deemer clause.

II. NEITHER THE NOTICE-PREJUDICE RULE NOR THE *ELFSTROM* RULE CONFLICTS WITH ANY SUBSTANTIVE PROVISION OF ERISA

UNUM argues that the notice-prejudice and *Elfstrom* rules are, in any event, preempted by conflict preemption principles because they are in conflict with various substantive provisions of ERISA. Pet. Br. 18; *see Boggs v. Boggs*, 520 U.S. 833, 841 (1997). UNUM makes three conflict preemption arguments. First, that this Court's decision in *Pilot Life* precludes Ward's claim; second, that application of the state laws at issue will conflict with ERISA's provisions by requiring the payment of claims that would not otherwise be "due" under the terms of the insurance policy "as written"; and third, application of the state laws may reverse the insurance company's "claims review" decision to deny benefits. None of these arguments has merit.

1. *Pilot Life*, upon which UNUM principally relies, is readily distinguishable. In *Pilot Life*, an ERISA plan member sought to recover compensatory and punitive damages for failure to pay benefits under the plan through assertion of a state common-law cause of action. This Court found that suit preempted, holding that Congress expressed a clear intent that suits to recover plan benefits must be brought exclusively under federal law; suits under state common law causes of action conflicted with that intent. 481 U.S. at 52-56. Ward's cause of action, by contrast, is for benefits due under his plan – which purchased an insurance policy subject to the notice-prejudice and *Elfstrom* rules. Claims for plan benefits are specifically

provided for in ERISA's civil enforcement scheme. Because Ward's claim is brought under ERISA, not state law, *Pilot Life* is no impediment to such a claim.

UNUM's unduly broad reading of *Pilot Life* effectively abrogates this Court's decision in *Metropolitan Life*. It is true that the success of Ward's suit depends, in part, on whether the insurance contract includes, by virtue of state law, a notice-prejudice provision (or whether the disavowal of an agency relationship contained in the insurance contract may be ignored if the facts show otherwise). In terms of conflict preemption, however, his suit is no different than a suit under ERISA to recover a benefit mandated by state law in a situation where the insurance policy terms omit the benefit or specifically indicate that the benefit is not provided. Both suits are brought under ERISA to recover benefits, but rely, in part, on state laws that modify or contradict the terms of the plan. Even though this Court held in *Metropolitan Life* that state mandated-benefit laws are not preempted by ERISA's express preemption clause, UNUM's reasoning would prevent any attempt to recover mandated benefits from an insurer of an ERISA plan who ignores the law on the theory that the law is in conflict with the plan's terms and the attempt to collect benefits not due under the terms of the plan is in conflict with ERISA's enforcement provisions. *Pilot Life* cannot be read to support such a result.

Finally, ERISA's civil enforcement provision (§502) does not operate to preempt state insurance laws that are saved from preemption by the saving clause, even if the state insurance law creates a remedy or cause of action. In this regard, the states agree with the position of the Solicitor General. *See* U.S. Br. 20-25. This Court has previously noted that "Congress did not intend to pre-empt entirely every state cause of action relating to such [ERISA] plans." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25 (1983). Laws which

regulate insurance are explicitly saved from preemption. The fact that a state insurance law may also provide a state law cause of action or remedy does not change its basic character as a law that regulates insurance.

2. UNUM further argues that the notice-prejudice rule and the *Elfstrom* rule conflict with ERISA's substantive provisions that require fiduciaries to administer plans "in accordance with" their written terms, and to provide benefits only if they are "due" under those terms. Pet. Br. 20, 32-33; 29 U.S.C. §§ 1104(a)(1)(D), 1132(a)(1)(B). UNUM reasons that application of these state laws will alter contrary terms it inserted into the insurance policy, which in this case constitute the terms of the plan, thereby creating a conflict with these provisions of ERISA. This reasoning allows plans to preempt any state regulation simply by inserting contrary terms in the plan documents. ERISA's requirements that plans be administered according to their written terms and benefits be paid only when due under those terms does not give ERISA plans *carte blanche* to override otherwise applicable law, federal or state. As the Eighth Circuit correctly recognized in *United of Omaha v. Businessmen's Assurance Co. of America*, 104 F.3d 1034, 1041 (8th Cir. 1997), accepting UNUM's position "would be to open the door for insurance companies to avoid any state insurance law simply by including a contrary provision in their group ERISA welfare plans." UNUM's proposed rule would permit ERISA plans and all entities providing services to such plans to evade virtually any state or federal regulation they desired. Congress never intended such a result, and this Court has never approved of such a result.

Adoption of UNUM's argument would render this Court's decisions in *Travelers* and its progeny meaningless Those cases recognize that ERISA operates against a background of traditional state laws that are presumptively not preempted.

Just as a hospital cannot evade state quality control standards by contracting with an ERISA plan to operate under lower standards, an insurance company cannot evade a state insurance regulation by contracting with an ERISA plan to operate in a manner contrary to state insurance laws.[10] Indeed, the application of the state law to the ERISA plan in *Dillingham* would have been preempted by conflict preemption principles were UNUM's position correct. In that case an apprenticeship training agreement, an "employee welfare benefit plan" within the meaning of ERISA, contained a wage scale that conflicted with California's prevailing wage statute. 519 U.S. at 332. Since the plan had not complied with the approval requirements of the prevailing wage law, application of the state law to the plan in that case required the plan to ignore its own plan terms (its wage scale), and pay benefits not due under the plan (the higher wages required under state law).

3. UNUM also claims (Pet. Br. 20, 35) that both the notice-prejudice and the *Elfstrom* rules conflict with the provision of ERISA that requires every employee benefit plan to comply with the benefit claims regulations issued by the Secretary of Labor. UNUM specifically argues that the state law doctrines conflict with those parts of the regulations which provide that a plan's claims procedures may provide for the filing of claims with an insurance company and that "a claim is filed when the requirements of a reasonable claim filing procedure . . . have been met." 29 C.F.R §2560.501-1(c), (d). This argument does not withstand scrutiny; neither the notice-prejudice rule nor the *Elfstrom* rule is in conflict with either of these provisions.

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[10] It may be that, although a state quality control standard does not "relate to" ERISA plans, a particular insurance regulation will "relate to" ERISA plans. But the conflicts preemption analysis is the same. Neither type of law conflicts with ERISA merely because it might conflict with the terms of a particular ERISA plan.

The procedures noted in the regulations are not intended to be exclusive. To the contrary, they specifically provide that they are the *minimum* requirements for employee benefit procedures. 29 C.F.R. §2560.501-1(a). Therefore, state law doctrines that supplement or impose more stringent requirements are not in conflict with the regulation. In *Pilot Life*, this Court found that ERISA's civil enforcement procedures were intended to be exclusive; UNUM's reliance upon *Pilot Life* is therefore misplaced.

The notice-prejudice rule does not conflict with the regulations' definition of when a claim is filed. It simply defines the consequences of untimeliness, whenever the claim is filed. *Elfstrom* does not conflict with that part of the regulation that allows for the filing of claims with an insurance company. It simply allows another party to be considered the agent of the insurance company for filing purposes pursuant to state common law agency principles. Because compliance with these regulations and the state laws at issue is not a "physical impossibility" and the state laws are not "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992), these laws are not preempted by principles of conflicts preemption.

III. THE *ELFSTROM* RULE DOES NOT "RELATE TO" ERISA PLANS

A. ERISA Does Not Preempt Generally Applicable State Law That Does Not Dictate Or Restrict The Administrative Or Benefit Choices Plans Make

In recent years, this Court has expressly held that ERISA did not alter the starting presumption in preemption cases that

"Congress does not intend to supplant state law." *Travelers*, 514 U.S. at 654; *Dillingham*, 519 U.S. at 331-32; *De Buono*, 520 U.S. at 814. Thus, a party seeking to demonstrate that ERISA preempts a state statute operating in a field "that has been traditionally occupied by the States . . . bear[s] the considerable burden of overcoming" that presumption. *De Buono*, 520 U.S. at 814 (internal quotations omitted). In *Travelers*, this Court concluded that the ERISA preemption analysis must "go beyond the unhelpful text" and "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." 514 U.S. at 656 (internal quotations omitted).

Since its very inception, ERISA's principal object has been to protect plan participants and beneficiaries from employer abuse and mismanagement. H.R. Rep. No. 93-533, at 1 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4639; *Boggs*, 520 U.S. at 844. As this Court has stated:

> in enacting ERISA, Congress's primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds.

Dillingham, 519 U.S. at 326-27 (citing *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)). Section after section of ERISA either explicitly or implicitly provides protections for employees. 29 U.S.C. §1001(a)-(c). As the United States has argued, "it would be extraordinary if a Congress that was intent on protecting the rights of plan participants and beneficiaries, see 29 U.S.C. 1001, in fact deprived those parties of the protection of traditional state regulation merely because the services ordinarily subject to that regulation were provided by ERISA plans." Brief for the United States as Amicus Curiae Supporting Petitioners, *De Buono v. NYSA-ILA Medical and Clinical Services Fund* at 20 (November 1996).

In *Dillingham* the Court set out the two-pronged "relate to" analysis as follows: First, a law which makes reference to an ERISA plan is preempted. "Where a State's law acts immediately and exclusively upon ERISA plans, as in *Mackey*, or where the existence of ERISA plans is essential to the law's operation, as in *Greater Washington Bd. of Trade* and *Ingersoll-Rand*, that 'reference' will result in preemption." 519 U.S. at 325.

Second, state laws which have a connection to ERISA plans are preempted. To determine whether a law has a connection to an ERISA plan, this Court looks both to ERISA's objectives as a guide to the scope of the state law that Congress understood would survive, and to the nature of the law's effect on ERISA plans. *Travelers*, 514 U.S. at 656; *Dillingham*, 519 U.S. at 325. Even assuming the basic purpose of ERISA's preemption clause is to "avoid a multiplicity of regulations in order to permit nationally uniform administration of employee benefit plans," *Travelers*, 514 U.S. at 657, a state law does not have a prohibited connection to plans if it "does not bind plan administrators to any particular choices," does not function as a regulation of the plan itself or interfere with uniform plan administration. *Id.* at 659. Thus, a state law of general application in an area of traditional state regulation that only influences plan administrative or benefit choices, *Travelers*, 514 U.S. at 662, merely imposes some burdens on the administration of ERISA plans, *De Buono*, 520 U.S. at 815, or simply "alters the incentives" without "dictat[ing] the choices facing ERISA plans" does not relate to plans within the meaning of the statute. *Dillingham*, 519 U.S. at 334. This new paradigm not only reflects a respect for traditional state powers, but also countenances a significant cabining of ERISA's preemptive effect.

This Court has recognized a wide range of state laws of general application, within the states' traditional authority, that are not preempted even though they may have some effect upon ERISA plans. For example, state health laws, tort laws, consumer protection laws, tax laws, and medical practice laws all have an effect on ERISA plans. Each is a traditional state responsibility and each represents concerns that extend well beyond ERISA issues. Congress could never have intended to preempt such laws.

B. The *Elfstrom* Rule Does Not "Relate to" ERISA Plans Because it Does Not Dictate or Restrict the Administrative Choices that an ERISA Plan Makes

The *Elfstrom* rule does not relate to ERISA plans. *Elfstrom* is merely the straightforward application of ordinary state common law agency principles to insurance companies. In fact, it is probably a misnomer to refer to the agency rule at issue as the "*Elfstrom* rule." The rule whose preemption is being reviewed is simply ordinary agency law; the expression "*Elfstrom* rule" was merely used by the Ninth Circuit as a shorthand expression for that agency law. (For convenience, we will also use that expression.) *Elfstrom* defines the legal consequences to insurance companies of involving others in policy administration by defining an agency relationship between them and other parties with whom they may do business. Because some ERISA plans purchase insurance, *Elfstrom* may have an indirect impact on those plans. *Elfstrom* may influence either the options available to ERISA plans in the insurance marketplace or the choices ERISA plans make

among those options.[11] However, it does not dictate or restrict the substantive or administrative choices ERISA plans make or impose any obligations upon plans. The *Elfstrom* rule is, therefore, one of many common laws regulating insurance company conduct that "do not 'relate to' benefit plans in the first instance." *Metropolitan Life*, 471 U.S. at 741.

Elfstrom does not refer to or depend upon the existence of ERISA plans. It applies to the relationship between insurers and any other party who may assist in policy administration. *See McCormick v. Sentinel Life Ins. Co.*, 153 Cal. App. 3d 1030, 200 Cal. Rptr. 732 (1984) (applying *Elfstrom* to the relationship between an insurer and a credit union). Because the *Elfstrom* rule is indifferent to the identity of the other party whom insurance companies may involve in policy administration and the other party's relationship, if any, to ERISA plans, the law makes no reference to plans. *See Dillingham*, 519 U.S. at 325.

Nor does the *Elfstrom* rule have a connection to plans even when, as in this case, it applies to the relationship between an insurance plan and an employer who purchased the insurance policy that funds the ERISA plan. *Eflstrom* applies generally applicable common law agency principles to insurance companies. Agency law is not an area with which ERISA is concerned. It is not part of a plan's administrative scheme such as a claims determination or benefits disbursement procedure.

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[11] As the California Supreme Court recognized in *Elfstrom*, the involvement of other parties in insurance policy administration is generally motivated by economic concerns, specifically reduced premium costs, that are advantageous to both the insurer and the policyholder. *Elfstrom v. New York Life Ins. Co.*, 67 Cal.2d 503, 509 (1967). These economic benefits may well be affected by the *Elfstrom* rule, resulting in insurance companies limiting the options they give policyholders to become involved in administration, or affecting the costs of those options.

See Fort Halifax Packing Co., 482 U.S. at 9. It is rather one of the "myriad state laws in areas traditionally subject to local regulation." *Travelers,* 514 U.S. at 668.

Elfstrom does not have a direct impact upon plans. It does not compel ERISA plans or plan sponsors to involve themselves in policy administration, nor does it prohibit such a choice. It does not impose any additional obligations upon employers who choose to become involved in policy administration. Unlike a mandated benefits law, which compels insured plans to "purchase the . . . benefits specified in the statute when they purchased a certain kind of common insurance policy," *Metropolitan Life*, 471 U.S. at 739, *Elfstrom* does not even indirectly dictate or restrict an ERISA plan's conduct. It does not tell insurers how to structure policies or policy administration. Nor does it dictate or restrict an insurance company's choices concerning who may be involved in the administration of insurance policies. Because *Elfstrom* does not mandate either an insurer's or an ERISA plan's choices concerning plan administration or benefit structure, it does not impede the uniform inter-state operation of plans. Assuming such options are available in the insurance marketplace, a plan which operates in numerous states may make uniform choices as to what parties will be involved in the administration of insurance policies it purchases. Application of the *Elfstrom* rule in this case will not require the plan or the employer to do anything differently in the future or to vary its conduct from state to state.

While *Elfstrom* does not impose legal obligations on insurers or plans, it does result in the imposition of legal consequences upon insurance companies who choose to involve others in the administration of the insurance policies they sell. By charging insurers with knowledge of those who are determined to be their agents, *Elfstrom* renders insurers

liable for the conduct of their agents. By charging UNUM, the insurer, with knowledge of MAC, the employer (assuming the facts establish an agency relationship under *Elfstrom*), UNUM may have to pay a claim it would have otherwise denied as untimely. However, that consequence is not imposed upon UNUM in its capacity as an ERISA fiduciary, but as an insurance company engaged in the business of insurance. Because the plan sponsor transferred the plan's risk of loss by insuring the plan, payment of that claim has no direct impact upon the plan. If UNUM has to pay more claims because of *Elfstrom,* it may raise its premiums in certain states. If it decides to supervise the entities who are involved in policy administration more closely, this may increase premiums. However, all kinds of non-preempted state laws that apply to insurance companies have a similar indirect economic impact upon plans.

To be sure, the indirect economic impact of *Elfstrom* may influence plan administrative choices. But a state law does not relate to plans simply because it imposes consequences on certain plan choices and therefore alters the incentives for plan choice. In *Dillingham,* this Court had little difficulty concluding that, because a statute merely altered the incentives facing ERISA plans, it did not "relate to" such plans. This was with full recognition that the incentives resulted from the consequences the state law imposed on certain choices: "The statute does not bind the plan to anything . . . . If a contractor chooses to hire apprentices for a public works project, it need not hire them from an approved program (*although if it does, it must pay those apprentices journeymen wages*)." *Dillingham*, 519 U.S. at 332 (emphasis added). Similarly, *Elfstrom* does not bind insurers, and therefore plans that buy insurance policies, to any particular administrative choice. However, if an insurer chooses to involve other parties in

policy administration, it will be charged with the knowledge of those who are determined to be its agents.

Nor, finally, does the *Elfstrom* rule "relate to" the ERISA plan because UNUM chose to include in the insurance policy terms that attempt to override it. Plans cannot avoid a state law by including terms in their employee benefit plan that contradict those laws. As discussed in Part II above, *Dillingham* could not have come out as it did if state law were preempted when the terms of an ERISA plan conflict with the law. Since the *Elfstrom* rule is a traditional state law that defines an agency relationship between an insurance company and other parties, and does not dictate or restrict plan structure, it has too tenuous an impact on plans to have a connection to them within the meaning of ERISA.[12]

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

[12] If, however, this Court concludes that *Elfstrom* does relate to plans, the states agree with the position of the United States that the case should be remanded to the Ninth Circuit to consider whether *Elfstrom* should be adopted as a rule of federal common law. U.S. Br. 28.

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